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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 435

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POOL MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 31-50) are reported in 70 N.L.R.B. 540. The *per curiam* opinion of the Court of Appeals (R. 66) is reported in 24 L.R.R.M. 2147.

JURISDICTION

The order of the Court of Appeals was entered on May 13, 1949 (R. 67). The Board's petition for rehearing was denied on June 16, 1949 (R. 67-73).

On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949. (R. 74). On October 28, 1949, the Board filed its petition for a writ of certiorari which was granted on January 9, 1950 (338 U. S. 909). The jurisdiction of this Court rests on Section 10 (e) of the National Labor Relations Act, as amended, and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (Supp. II) 141, *et seq.*) are set forth in the Appendix to the brief for the National Labor Relations Board in the *Mexia Textile Mills* case, No. 434, this Term.

STATEMENT

Pursuant to charges filed by United Garment Workers of America, affiliated with the American Federation of Labor, herein called the Union (R. 28-29), the Board, on April 10, 1946, issued

a complaint against Pool Manufacturing Company, herein called the Company, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 24-28). A hearing on the complaint was held before a trial examiner, who, thereafter, on June 25, 1946, issued his intermediate report, finding that the Company, in violation of Section 8 (1) and (5) of the Act, had refused to bargain with the Union which had been certified by the Board as the employees' bargaining representative by persistently refusing to discuss any provision of the Union's proposed contract unless wages were first agreed upon; that such refusal to bargain had caused and prolonged a strike among the Company's employees which was still in progress at the date of the Board hearing; and that during the strike the Company had not only continued to reject all Union requests for the negotiation of terms and conditions of employment other than wages but had withdrawn all its previous counterproposals in regard to that subject and had otherwise interfered with the exercise of the rights guaranteed its employees under Section 7 of the Act by individually soliciting them to return to work and threatening loss of their jobs if they failed to abandon the strike immediately (R. 33-50). To remedy the unfair labor practices in which the Company was found to have engaged, the trial

examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union, offer the striking employees reinstatement to their former or substantially equivalent positions with back pay from the date of the Company's refusal to reinstate them; and post appropriate notices (R. 50-55).

On June 28, 1946, the Board entered an order transferring the case to the Board, and, on the same date, a copy of said order and of the intermediate report were duly served upon the Company (R. 30, 56). The Company at no time thereafter filed any exceptions to the intermediate report as permitted by Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended (8 Fed. Reg. 16047, 16051, Section 202.33) then in effect.[1] On August 26, 1946, pursuant to the provisions of Section 35 of Article II of the Rules and Regulations of the Board (8 Fed. Reg. 16047, 16051, Sec-

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[1] The pertinent provisions of Section 33 read as follows: "Within fifteen days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of this Article, any party or counsel for the Board may file with the Board at Washington, D. C., an original and four copies of a statement in writing setting forth such Exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. * * *

"No matter not included in a statement of Exceptions may thereafter be objected to before the Board, and failure to file a statement of Exceptions shall operate as a submission of the case to the Board on the record."

tion 202.35),[2] the Board issued its order adopting the findings, conclusions and recommended order set forth in the intermediate report (R. 31-33).

On February 9, 1949, the Board filed its petition for enforcement in the court below (R. 1-6) and thereafter filed a certified transcript of the record (R. 55-56). On April 18, 1949, the Board also filed in the court below its motion for the summary entry of a decree to enforce its order, alleging that in view of Section 33 of the Board's Rules, above mentioned, and of Section 10 (e) of the Act, as amended, which provides that no objection which has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, the Company's failure to file exceptions to the trial examiner's findings and recommended order constituted a waiver of all objections to the order of the Board and that no contestable issue was before the court (R. 56-58). In response to the Board's petition, the Company, on April 18, 1949, filed a motion to remand the case to the Board for the purpose of adducing additional evidence to show that the

[2] Section 35 provides that: "Upon the expiration of the period for filing a statement of Exceptions and brief, as provided in Section 33 of this Article, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other agent or agency, or may close the case upon compliance with the recommendations of the Intermediate Report, or may make other disposition of the case.

Company had complied at least in part with the provisions of the Board's order of August 26, 1946; and that after bargaining with the Union, the parties had been unable to reach an agreement; that the Union has not bargained in good faith; and that the Union may not now represent a majority of its employees (R. 59-61).

The Board, on May 3, 1949, filed its opposition to the Company's motion to remand (R. 62-65). On May 13, 1949, the court below entered its order deferring action on the Board's motion for summary judgment and remanding the case to the Board with directions to take evidence and report (1) whether and to what extent the Company has complied with the Board's order; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 67).[3] On June 3, 1949, the Board filed its petition for rehearing (R. 67-73) which the court below denied on June 16, 1949 (R. 73).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

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[3] The court below did not direct the Board to take evidence as to whether the Union had ceased to represent a majority of the Company's employees.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for summary entry of a decree upon the transcript of the record.

ARGUMENT

The issues presented by this case are identical to those presented in *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, No. 434, this Term. About the only difference between the two cases is that here the trial examiner submitted his intermediate report and the Board entered its order before the enactment of the Labor Management Relations Act, 1947.[4] The last sentence of Section 10 (c) of the Act, as amended, which provides that an order recommended by a trial examiner shall automatically become the order of the Board unless excepted to within twenty days is not, therefore, applicable.

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[4] Also, in this case but not in the *Mexia* case, the Company sought leave of the court below to adduce additional evidence to show that the Union had not bargained in good faith (*supra*, p. 6). If such evidence existed, it could show only that the Union had violated Section 8 (b) (3) of the Act, as amended, which makes it an unfair labor practice for a labor organization to refuse to bargain with an employer if it is the representative of his employees and the Company's remedy would have been to file an unfair labor practice charge with the Board against the Union. Such conduct on the part of the Union would, of course, be no defense to the Board's order requiring the Company, upon request, to bargain with the Union, and the court below properly did not direct the Board to take evidence on that issue.

But the inapplicability of this provision does not affect the Board's right to enforcement of its order. The Company did not except to the intermediate report or to the order recommended by the trial examiner, which the Board adopted. Having failed to object to the order before the Board, the Company was, under the provisions of Section 10 (e), both as originally enacted and as amended, precluded from challenging it before the court. *National Labor Relations Board* v. *Cheney California Lumber Company*, 327 U. S. 385, 388-389.

Moreover, the only issue of fact on which the court below, in remanding the case, directed the Board to take evidence was the question whether and to what extent the Company had complied with the order. As shown in our brief in the *Mexia Textile Mills* case, this issue is irrelevant in a proceeding to enforce a Board order and evidence relating thereto is not material within the meaning of the provision of Section 10 (e) authorizing the grant of leave to adduce additional evidence. The decision reached in the *Mexia* case will, we believe, govern the disposition of this case. Accordingly, we respectfully refer the Court to the reasons for reversing the order of the court below and directing the entry of a decree enforcing the Board's order which are set forth in our brief in that case.

CONCLUSION

For the reasons stated in our brief in the *Mexia* case, we respectfully submit that the order of the

court below should be reversed and the cause remanded with instructions to enter a decree enforcing the Board's order.

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